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91-2062

Supreme Court, U.S.
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In the Supreme Court of the United States

1991-1992 Term

Charles E. Gavette

Petitioner

v.

Internal Revenue Service

Respondent

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Petitioner's Supplemental Brief

Petition for Writ of Certiorari

to the

United States Court of Appeals for the
Sixth Circuit

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Previous decisions of the Merit Systems Protection Board and of other courts conflict with the standard applied by the courts reviewing Petitioner's case below. Other courts have consistently held that the burden is the agency's, not the employee's, to achieve compliance with the re-employment and promotion provisions at issue. Indeed, the same provisions apply to both veterans of the armed forces and to handicapped worker[1], and the decisions have, time and again, focused on the agency's duty to inform the employee, and to furnish every mechanism to facilitate compliance. The courts below failed to acknowledge or to apply this standard, and instead, improperly reversed it and placed the burden on Petitioner. This is contrary to law and to the holdings of

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[1] Petitioner is a qualified handicapped person under the Act, and the District Court did not rule otherwise.

other courts and of the Merit System Protection Board. See, e.g., Gavette v Department of Treasury, 44 M.S.P.R. 166 (1991); Metropolus v United States Postal Service, 33 M.S.P.R. 536 (1987); Whitefield v United States Postal Service, 5 M.S.P.R. 239 (1981).

In Shiflett v. United States Postal Service, 839 F.2d 669, 674 (Fed. Cir. 1988), the US Court of Appeals for the Federal Circuit found good cause for the Appellant's late failing of her appeal. The Court held that the critical and controlling facts, once an agency fails to provide an employee with the required notice of appeal rights, is not whether the Appellant acted with due diligence when she became aware of her appeal rights, but rather, " the flagrant violation of the regulations by the respondent in failing to give the Petitioner notice of her appeal rights in the form and manner prescribed

by the regulations " at any time prior to the filing of the appeal.

Therefore, applying Shiflett, even if Petitioner failed to file an interest card, it does not defeat his right to promotions, because of the IRS's violation of the regulation requiring that it tell him of his promotional rights in the first place[2].

Consistent with this, in Hetrick v. The Department of Interior, 39 M.S.P.R. 426 (1989), the Merit Systems Protection Board excused the lateness of the employee's request for restoration, by three and a half years beyond the regulatory time limit, because the agency failed to provide the employee with notice of the right to request restoration

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[2] These rights are effective immediately when the employee leaves work because of a compensable injury, unless the agency controverts the claim. F.P.M. Subchapter 2-6.

following recovery from a compensable injury. This is the same provision, 5 CFR Section 353.106, which is in dispute in the case at bar.

The rights of a member of a military to be restored to employment are protected under the same provisions as for persons injured and placed on workers compensation. In Hetesler v. The Department of the Air Force, 24 M.S.P.R. 150 (1984), the Merit Systems Protection Board held that the agency made insufficient effort to locate the employee to send him information concerning a position. This militates against the concern expressed by the Sixth Circuit in the case at bar, when, at oral argument, where it decried the burden on the agency involved in sending notices of promotion openings.

This same duty was applied, in Cox v. U.S. International Trade Commission, 6 M.S.P.B. 287 (1981), to hold that any burden incurred by the agency to make a

position available for the exercise of restoration rights was defeated by the right of the employee who was not responsible for the delay.

Phillips v. Department of Transportation, 22 M.S.P.R. 223 (1984), in considering the same issue, held that nothing in the regulation indicated that an agency may limit consideration to the region in which in the employee was formerly located. See also, Andrews v. Department of Air Force, 47 M.S.P.R. 233 (1991)(An agency was required to provide a mechanism for considering employees for promotion who were absent due to military duty.) Therefore, the courts below erred in not finding that IRS's failure to provide such a mechanism violates this provision.

In addition, the decision below conflicted with that in Cobb v. Prokop, 557 F. Supp. 391 (D. Mass. 1983). This case, arising under the Veteran's Reemployment Rights Act of

1974, 38 U.S.C. Sect. 2021 et seq., rejected the decisions below holding that Plaintiff's appeal of improper restoration (and failure to promote her) exceeded the 15-day limitation period in 5 C.F.R. Sect. 353.401(a)(iv)(1976).

The language setting forth reemployment rights in the Veteran's Act is redolent of that in the case at bar, providing for such rights as

> "the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment." 38 U.S. Sect. 2021(b)(2).

Indeed, the Cobb court cited 5 C.F.R. Sect. 353.201(a), the provision in dispute at bar, and found that this regulation mandated careful scrutiny of the findings below. 557 F. Supp. at 396.[3] The Court found error in imposing on

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[3] This decision was an appeal from the M.S.P.B.

Plaintiff the burden of discovering whether a vacancy existed.

> "The Act charges the V.A. with an affirmative obligation to consider for promotion those employees who had been absent from duty because of military service. Even if Cobb had never inquired about the opening in question here, the VA would, nonetheless, have had the affirmative obligation to consider her for promotion to an existing vacancy." 557 F. Supp. at 396.

The Court found improper the failure to notify Plaintiff of the existence and availability of positions to which she may have been eligible for promotion. Because Cobb, as did Plaintiff at bar, did not have reason to believe that pursuit of employment opportunities would be successful, the Court found that she exercised due diligence under the circumstances of that case. This is of course contrary to the standard applied by the courts which reviewed the case at bar, which imposed the standard on Petitioner, not the Agency. Those courts additionally ignored the mandate of 5 C.F.R.

Sect. 353.107, which requires the agency to "maintain the necessary records to assure that all such employees [injured or on military duty] are preserved the rights and benefits granted by law". The record of the Sixth Circuit Court of Appeals' questions reflects a focus on burden to the agency, both in terms of record-keeping and providing these promotion rights. However, a Court may not second-guess the legislative determination that our veterans and the handicapped are both entitled to specific promotion and re-employment rights.

It is the agency's burden to provide the employee with relevant information to permit him to proceed with promotions. It was not Petitioner's responsibility to figure out that he was eligible for promotions, and that he had to fill out an interest card to obtain one. Indeed, the failure to provide Petitioner with promotion information contravened the

requirement that the handicapped worker be treated as if he were employed.

It is further the agency's burden to show it has made all reasonable efforts to comply with these requirements, as to re-employment rights[4], and as to promotions. See, e.g., Harrison v. Marsh, 46 F.E.P. Cases 971 (W.D. Mo. 1988).

> "[A]gency power to make rules that affect substantial individual rights and obligations carries with it the responsibility not only to remain consistent with the governing legislation, but also to employ procedures that conform to the law." Morton v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L.Ed.2d 270, 292 (1974)(citations omitted).

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[4] Indeed, whether an employee knew that he had to satisfy certain procedural requirements, i.e., in the case at bar, to file an interest card, is a question of fact that renders improper a grant of summary judgments. Thornhill v Marsh, 49 FEP Cases 6 (9th Cir. 1989).

Accordingly, Petitioner's request for a writ of certiorari should be granted.

Respectfully submitted,

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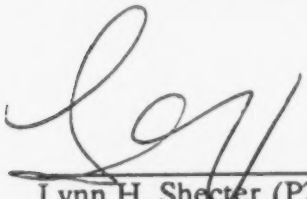

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